IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-150755 TRIAL NO. B-1406296
Plaintiff-Appellee,	:	
vs.	:	
BRITTNEY DAVIS,	:	*JUDGMENT ENTRY.*
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Brittney Davis appeals her convictions, following a jury trial, for two counts of felonious assault, in violation of R.C. 2903.11(A)(1) and (2). We affirm the trial court's judgment.

After several run-ins with Tiara Boone and her sister D'Arricka Franklin in the early morning of September 20, 2014, Brittney Davis struck Boone and her cousin Terenc Green with a car. Green's injuries were minor, but Boone's injuries were severe enough that she required weeks of hospitalization.

The state presented the testimony of Boone, Franklin, and Green, who had seen Davis and her friend Tacoura Olagbemiro numerous times on the morning of the assault. They argued with her while in line at a restaurant. Shortly thereafter,

they saw her come out of the restaurant and open the driver's door of a black car to put items in it. Then Davis and Olagbemiro got into a fistfight with Boone and Franklin that lasted five to 10 minutes. After the fight, Franklin and Green saw Davis get into the driver's seat of the black car and drive away with Olagbemiro. Within minutes, they saw Davis drive around the block, heard her yelling at them, and saw her throw a drink at them from her car window. Then Boone and Green stood in a parking lane to talk to the driver of a car that was stopped near an intersection. Franklin testified that Davis drove her car directly into them at approximately 40 m.p.h.

Arin Gentry, the driver of the car that was stopped near the intersection, testified that she believed that the driver of the black car had intentionally struck Boone and Green. Gentry said that she had had her left-turn signal on at the time, and that the black car had passed her on the left in a parking lane that left little room for passing, rather than in the open lane of travel to her right. Gentry testified that the black car had been traveling at a high rate of speed and did not stop after hitting Boone and Green.

In the defense case, Olagbemiro testified that Davis had been the driver of the black car. But Davis and two of her relatives testified that Olagbemiro had been the driver. Davis testified that her eye had been injured in the fistfight, so Olagbemiro had had to drive the car.

In her first assignment of error, Davis argues that the trial court erred by not permitting her to impeach the credibility of her witness Olagbemiro. After Olagbemiro denied having been subpoenaed for court, defense counsel sought to have another witness identify Olagbemiro by her mugshot and testify that he had served her with a subpoena. We find no abuse of discretion by the trial court in not

allowing the testimony. *See State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. It is well settled that a witness may not be impeached by extrinsic evidence that merely contradicts her testimony on a matter that is collateral and not material to any issue in the trial. Evid.R. 608(B); *State v. Boggs*, 63 Ohio St.3d 418, 422, 588 N.E.2d 813 (1992). We overrule the first assignment of error.

In her second assignment of error, Davis argues that she was denied the effective assistance of trial counsel because her attorney failed to file a motion to suppress the pretrial identification by Boone, Green and Franklin. The failure to file the motion is not per se ineffective assistance. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). In this case, Davis has failed to show that there was a basis to suppress the evidence in question. The police compiled a photo array of similar looking individuals, and a blind administrator had Green, Franklin and Boone separately observe the array. Each of them selected the photograph of Davis with certainty and without hesitation. Consequently, Davis has failed to demonstrate that the identification procedure was unduly suggestive or that the identifications were unreliable. *See State v. Murphy*, 91 Ohio St.3d 516, 534, 747 N.E.2d 765 (2001). Therefore, she has failed to establish that there was a basis to suppress the evidence. *See State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 35.

Next, Davis contends that counsel was ineffective because he did not object to a police officer's "vouching" for Green's version of the incident. Because Davis failed to object at trial, this claim is waived unless the officer's statement was plain error. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Our review of the officer's comment demonstrates that it was a characterization of what Green had told

him, and in no way indicated his opinion as to Green's truthfulness. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 122. No plain error occurred.

Davis also challenges defense counsel's question to Boone about whether she had been "drunk," because Boone responded that she was not drunk and that she was "alert and observant." But this single response, in the context of the entire examination, had minimal impact because Boone further admitted that she had been drinking vodka and was "under the influence" at the time she first encountered Davis.

Davis further complains that counsel should not have called Olagbemiro as a witness. We note that counsel sought and was granted the opportunity to question Olagbemiro as if on cross-examination. Counsel's questioning led to Olagbemiro's admission that she and Davis had argued about which of them should confess to having committed the assault.

In the end, we will not second-guess trial-strategy decisions, and we will presume that counsel's performance fell within the wide range of reasonable professional assistance. *See State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998). Davis has failed to show deficient performance or resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). We overrule the second assignment of error.

In her third assignment of error, she challenges the weight and sufficiency of the evidence supporting her convictions. She contends that the state failed to prove that she had been the driver of the car that struck Boone and Green. In the

alternative, she argues that the state failed to prove that she had knowingly used the car as a deadly weapon.

Following our review of the record, we are convinced that the jury could have found all the elements of felonious assault proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). The state presented evidence that Davis had deliberately driven the car at a high rate of speed directly at plainly visible pedestrians without stopping or changing direction. *See State v. M.L.D.*, 10th Dist. Franklin No. 15AP-614, 2016-Ohio-1238, ¶ 36; *State v. Hudson*, 7th Dist. Mahoning No. 11 MA 130, 2012-Ohio-5614, ¶ 28. Moreover, although Davis denied that she had been driving the car, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. We cannot say that the jury, in resolving conflicts in the evidence, lost its way and created a manifest miscarriage of judgment to warrant a reversal of Davis's convictions. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Therefore, we overrule the third assignment of error.

In her fourth assignment of error, Davis challenges the imposition of consecutive sentences, but the record reveals that the trial court made the required statutory findings and incorporated them into its sentencing entry. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659; *State v. Harris*, 1st Dist. Hamilton No. C-120531, 2013-Ohio-2721. Next, Davis contends that the trial court failed to consider the purposes and principles of sentencing, but she has failed to demonstrate the error. Each of her sentences fell within the statutory range, and the sentences were not contrary to law. *See State v. Taylor*, 1st Dist. Hamilton No. C-150488, 2016-Ohio-4548, ¶ 3. Finally, we reject Davis's arguments with respect to

certain notifications because we have held that a trial court's failure to make the enumerated notifications is harmless error. *Taylor* at ¶ 4-6. We overrule the fourth assignment of error and affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., MOCK and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on November 23, 2016

per order of the court _____.

Presiding Judge